INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
Argument	5
Appendix	7

CITATIONS

Cases:	
Helvering v. *Kehoe*, 309 U. S. 277	5
Statutes:	
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 213	7
Sec. 217	8
Revenue Act of 1934, c. 277, 48 Stat. 680:	
Sec. 293 (U. S. C., Title 26, Sec. 293)	8
Miscellaneous:	
Treasury Regulations 69, Art. 328	8

295898—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 733

NICHOLAS ROERICH, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 36–57) is reported in 38 B. T. A. 567. The opinion of the Court of Appeals (R. 233–238) is reported in 115 F. (2d) 39.

JURISDICTION

The judgment of the Court of Appeals was entered on September 3, 1940 (R. 239). The time within which a petition for a writ of certiorari

could be filed was extended for a period of sixty days from December 3, 1940, by order of the Chief Justice (R. 240). The petition for a writ of certiorari was filed on January 31, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Did certain amounts which were transferred to the petitioner during 1926 and 1927 represent the purchase money for certain pictures painted by the petitioner, and therefore income to him, or were they merely advances to defray the expenses of a scientific expedition conducted by him?

2. Was the failure of the petitioner to file an income-tax return for the year 1934 due to fraud with intent to evade taxes under Section 293 (b) of the Revenue Act of 1934?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved herein are set forth in the Appendix, *infra*, pp. 7–12.

STATEMENT

This case involves income taxes for the years 1926, 1927, and 1934. The facts, as found by the Board of Tax Appeals (R. 37–49), may be summarized as follows:

The petitioner, a nonresident alien, is an artist and scientist (R. 37). With various followers, in-

cluding Louis L. Horch, his chief financial backer, he organized three corporations concerned with artistic instruction, exhibition and sales: Corona Mundi, Inc., Master Institute of United Arts, Inc., and Roerich Museum, Inc. The museum was organized to acquire his own artistic productions (R. 38–39). During 1923 to 1928 he led an expedition to Asia for scientific purposes and to enable him to paint pictures of the East (R. 66, 98). Practically all the financial backing of the expedition came from Horch, who had become interested in the petitioner's artistic activities and cultural enterprises (R. 38–39). While the expedition was in progress, the petitioner painted several hundred pictures and sent them back to the United States, where they were hung in the museum (R. 41). During 1926, Horch, who held a power of attorney to receive petitioner's money and maintain a bank account for him (R. 40), deposited $73,300 of his own money in Roerich's bank account (R. 42), and in 1927, deposited $74,271.78 (R. 54). At the same time some other amounts were paid and deposited by other persons (R. 42, 54).

The principal issue in the case is whether the paintings were purchased by Horch and given by him to the museum, or were given to the museum by Roerich, who received the money merely as agent for Horch and the others to defray the costs of the expedition. Horch's authority under the power of attorney included the power to sell paintings for

the petitioner, who had agreed before departing to allow the Master Institute and Corona Mundi to purchase his paintings at prices to be established by mutual agreement and according to the "present prices" of his paintings (R. 40). His purpose was to have the paintings hung in the museum. Horch sent the petitioner several communications to Asia reporting on the bank balances and advising of deposits and purchases of paintings by Horch (R. 42–43, 52). Also, petitioner signed a letter in 1928 confirming the fact that the paintings had theretofore been sold to Horch (R. 45).

The Board held that Horch bought the paintings from Roerich and that the amounts deposited in the bank account were taxable income to Roerich for the years involved, 1926 and 1927. The Court of Appeals affirmed the decision of the Board.

A further issue arises out of the failure of Roerich to file any return of his income for 1934. It is admitted that there was net taxable income in an amount to warrant the filing of a return and payment of a tax. Petitioner concedes that sales of paintings took place in that year which gave rise to the income (Pet. 20). The Commissioner assessed a 50 per centum penalty on the ground that this failure was due to fraud with intent to evade tax, and the Board of Tax Appeals and Court of Appeals upheld the Commissioner's action.

ARGUMENT

This case presents neither a conflict of decisions nor a question of general importance. The central issue is simply whether the findings of the Board are properly supported by the record.

The Board determined that the amounts deposited to petitioner's account in 1926 and 1927 represented payment for various paintings, and were not merely advances to be used by petitioner on his expedition. The record shows that those amounts were treated as payment for the pictures involved not only by Horch, but by the petitioner himself. In the circumstances, the court below correctly refused to disturb the Board's findings, which were thus amply supported by the record.[1]

The court below likewise correctly affirmed the Board's finding as to fraud for the year 1934 (cf. *Helvering* v. *Kehoe,* 309 U. S. 277), and, in any event, neither that question nor the questions with respect to the years 1926 and 1927 call for further review by this Court.

---

[1] The brief in support of the petition makes various contentions unrelated to the questions presented in the petition, and those contentions are therefore probably not properly before the Court. See Rule 38 (2). In any event they appear to be wholly without merit. For example, the suggestion that petitioner should be allowed to deduct the expenses of the expedition is foreclosed by the specific requirement in Section 217 (g) (1) which allows deductions to nonresident aliens only where a return has been duly filed; and the record shows that he did not file returns for the years 1926 and 1927 (R. 48).

The petition should be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
MICHAEL H. CARDOZO, IV,
Special Assistants to the Attorney General.

FEBRUARY 1941.

APPENDIX

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 213. For the purposes of this title, except as otherwise provided in section 233—

(a) The term "gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period.

* * * * *

SEC. 217. * * *

(g) (1) Except as provided in paragraph (2) a nonresident alien individual or a citizen entitled to the benefits of section 262 shall receive the benefit of the deductions and credits allowed in this title only by filing or causing to be filed with the collector a true and accurate return of his total income received from all sources in the United States, in the manner prescribed in this title; including therein all the information which the Commissioner may deem necessary for the calculation of such deductions and credits.

* * * * *

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

U. S. C., Title 26, Sec. 293.

Treasury Regulations 69, promulgated under the Revenue Act of 1926:

ART. 328. *Income from the sale of personal property derived from sources partly within and partly without the United States.*— Items of gross income not allocated by articles 317–324 or 327 to sources within or without the United States shall (unless unmistakably from a source within or a source

without the United States) be treated as derived from sources partly within and partly without the United States. Such income derived from the sale of personal property may be divided into two classes: (A) income derived from sources partly within the United States and partly within a foreign country, and (B) income derived from sources partly within the United States and partly within a possession of the United States.

A. The portion of such income derived from sources partly within the United States and partly within a foreign country which is attributable to sources within the United States shall be determined according to the following rules and cases:

Personal property produced and sold.—Gross income derived from the sale of personal property produced (in whole or in part) by the taxpayer within the United States and sold within a foreign country, or produced (in whole or in part) by the taxpayer within a foreign country and sold within the United States shall be treated as derived partly from sources within the United States and partly from sources within a foreign country under one of the cases named below. As used herein the word "produced" includes created, fabricated, manufactured, extracted, processed, cured, or aged.

Case 1 A. Where the manufacturer or producer regularly sells part of his output to wholly independent distributors or other selling concerns in such a way as to establish fairly an independent factory or production price—or shows to the satisfaction of the Commissioner that such an independent factory or production price has been otherwise

established—unaffected by considerations of tax liability, and the selling or distributing branch or department of the business is located in a different country from that in which the factory is located or the production carried on, the net income attributable to sources within the United States shall be computed by an accounting which treats the products as sold by the factory or productive department of the business to the distributing or selling department at the independent factory price so established. In all such cases the basis of the accounting shall be fully explained in a statement attached to the return.

Case 2 A. Where an independent factory or production price has not been established as provided under case 1 A, the net income shall first be computed by deducting from the gross income derived from the sale of personal property produced (in whole or in part) by the taxpayer within the United States and sold within a foreign country or produced (in whole or in part) by the taxpayer within a foreign country and sold within the United States, the expenses, losses, or other deductions properly apportioned or allocated thereto and a ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income. Of the amount of net income so determined, one-half shall be apportioned in accordance with the value of the taxpayer's property within the United States and within the foreign country, the portion attributable to sources within the United States being determined by multiplying such one-half by a fraction the numerator of which consists of the value of the taxpayer's property within the United

States, and the denominator of which consists of the value of the taxpayer's property both within the United States and within the foreign country. The remaining one-half of such net income shall be apportioned in accordance with the gross sales of the taxpayer within the United States and within the foreign country, the portion attributable to sources within the United States being determined by multiplying such one-half by a fraction the numerator of which consists of the taxpayer's gross sales for the taxable year or period within the United States, and the denominator of which consists of the taxpayer's gross sales for the taxable year or period both within the United States and within the foreign country. The "gross sales of the taxpayer within the United States" means the gross sales made during the taxable year which were principally secured, negotiated, or effected by employees, agents, offices, or branches of the taxpayer's business resident or located in the United States. The term "gross sales" as used in this paragraph refers only to the sales of personal property produced (in whole or in part) by the taxpayer within the United States and sold within a foreign country or produced (in whole or in part) by the taxpayer within a foreign country and sold within the United States, and the term "property" includes only the property held or used to produce income which is derived from such sales. Such property should be taken at its actual value, which in the case of property valued or appraised for purposes of inventory, depreciation, depletion, or other purposes of taxation shall be the highest amount at which so valued or appraised, and which in other cases shall be

deemed to be its book value in the absence of affirmative evidence showing such value to be greater or less than the actual value. The average value during the taxable year or period shall be employed. The average value of property as above prescribed at the beginning and end of the taxable year or period ordinarily may be used, unless by reason of material changes during the taxable year or period such average does not fairly represent the average for such year or period, in which event the average shall be determined upon a monthly or daily basis. Bills and accounts receivable shall (unless satisfactory reason for a different treatment is shown) be assigned or allocated to the United States when the debtor resides in the United States, unless the taxpayer has no office, branch, or agent in the United States.

Case 3 A. Application for permission to base the return upon the taxpayer's books of account will be considered by the Commissioner in the case of any taxpayer who, in good faith and unaffected by considerations of tax liability, regularly employs in his books of account a detailed allocation of receipts and expenditures which reflects more clearly than the processes or formulas herein prescribed, the income derived from sources within the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1941